

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEVE BREEDEN,

Plaintiff,

-vs-

KAISER ALUMINUM & CHEMICAL
CORPORATION, a Delaware
corporation,

Defendant.

NO. CV-05-363-LRS

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

BEFORE THE COURT is Defendant's Motion for Summary Judgment. (**Ct. Rec. 13**), which was orally argued on March 1, 2007 and again on May 15, 2007. Lawrence J. Kuznetz participated on behalf of the Plaintiff and William M. Symmes and Michael F. Nienstedt participated on behalf of the Defendant. After careful review of the pleadings submitted by all parties and with the benefit of oral argument, this order will memorialize and supplement the oral rulings of the Court on May 15, 2007, which are incorporated herein by reference.

I. DISCUSSION:

Plaintiff filed this case in October 2005 alleging that his employer, Kaiser Aluminum, violated the Washington Law Against Discrimination (WLAD) by discriminating against him for the perceived disability of taking prescription pain medication. Furthermore,

1 Plaintiff alleges that his employer failed to accommodate him. See
2 *Complaint*.

3 Plaintiff's case turns in part on the definition of the term
4 disability under Washington law. Plaintiff requested that the Court stay
5 the motion for summary judgment and other proceedings herein until the
6 Washington State Supreme Court ruled on the motion for reconsideration
7 in *McClarty v. Totem Pole*, 157 W.2d 214 (2006).

8 On July 6, 2006, the Washington Supreme Court issued a decision in
9 *McClarty, supra*. In the opinion, the Court adopted the definition of
10 disability used in the federal Americans with Disabilities Act. *Id* at
11 228. A motion for reconsideration was filed therein on July 26, 2006.
12 As of March 1, 2007, the Court had not yet ruled on the motion and
13 legislation amending the WLAD was pending before the Washington State
14 legislature. Because of these developments, Plaintiff's motion for a
15 stay of proceedings in this case was granted on March 2, 2007. (Ct. Rec.
16 88).

17 On March 8, 2007, the Washington State Supreme Court issued an order
18 denying the motion for reconsideration in *McClarty, supra*. In addition,
19 the Washington State legislature passed a bill amending the WLAD which
20 was signed by Governor Gregoire on May 4, 2007. The law will take effect
21 on July 22, 2007. The law, which amends the current statute,
22 specifically includes a retroactivity clause. The stay of proceedings
23 herein was lifted on May 2, 2007. (Ct. Rec. 100). The parties submitted
24 supplemental briefing on May 11, 2007.

25 **A. SUMMARY JUDGMENT STANDARD**

26 Under Rule 56c, summary judgment is proper "if the pleadings,

1 depositions, answers to interrogatories, and admissions on file, together
2 with the affidavits, if any, show that there is no genuine issue as to
3 any material fact and that the moving party is entitled to a judgment as
4 a matter of law." Fed. R. Civ. P. 56c). In ruling on a motion for
5 summary judgment the evidence of the non-movant must be believed, and all
6 justifiable inferences must be drawn in the non-movant's favor. *Anderson*
7 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986).
8 However, when confronted with a motion for summary judgment, a party who
9 bears the burden of proof on a particular issue may not rest on its
10 pleading, but must affirmatively demonstrate, by specific factual
11 allegations, that there is a genuine issue of material fact which
12 requires trial.

13 **B. PREEMPTION DOCTRINE DOES NOT APPLY**

14 Defendant argues that Plaintiff's claims are preempted by the federal
15 law controlling collective bargaining agreements. See Labor Management
16 Relations Act codified at 29 U.S.C. § 185. Plaintiff argues that the
17 preemption doctrine does not apply in this case because it is a claim for
18 disability discrimination, not for unfair labor practices by Kaiser. For
19 the reasons noted in its oral ruling, this Court agrees with Plaintiff
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21 that *Bruce v. Northwest Metal Products, Co.*, 79 Wn.App. 505, 513 (1995)
22 and the case law cited therein supports Plaintiff's position.

23 **C. LEGISLATIVE AMENDMENT APPLIES RETROACTIVELY**

24 The legislature is empowered to change or amend existing laws, and
25 may in certain situations apply such amendments retroactively. *Marine*
26 *Power & Equipment Co., v. Washington St. Human Rights Comm. Hearing Tribe,*

1 39 Wn.App. 609, 615 (1985). The Legislature may not claim clarification
2 and retroactively overrule a Supreme Court decision construing a statute
3 without violating the separation of powers doctrine involving the three
4 branches of government. However, if the amendment changes or amends an
5 existing statute and is remedial as defined by case law, such legislative
6 action is permissible. While an amendment is presumed to operate
7 prospectively, this presumption is reversed to favor retroactive
8 application in those instances where the legislation is remedial, concerns
9 procedure or forms of remedies and does not affect a substantive or vested
10 right. *Id.* at 616, 617. Under the circumstances before this Court, the
11 act passed by the legislature was predominantly a remedial amendment to
12 existing law which does not affect a substantive or vested right.

13 For the reasons set forth in its oral ruling, the Court finds the
14 Legislature's amendment applies retroactively to this case, and therefore,
15 the McClarty definition of disability does not apply. The last section
16 of the amended statute specifically states: "NEW SECTION. Sec. 3 This
17 act is remedial and retroactive, and applies to all causes of action
18 occurring before July 6, 2006, and to all causes of action occurring on
19 or after the effective date of this act." RCW 49.60.040 and 2006 c 4 s
20 4 (as amended).

21 **D. GENUINE ISSUES OF MATERIAL FACT EXIST**

22 In addition, the Court finds there are genuine issues of material
23 fact, which bar summary judgment at this juncture, including, but not
24 limited to, whether Kaiser perceived the Plaintiff as disabled, and
25 whether Plaintiff is in fact disabled. Furthermore, in his complaint,
26 Plaintiff claims that Kaiser failed to accommodate Mr. Breeden's

1 disability. As Plaintiff notes the issue of accommodation is generally
2 one for the jury. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629 (2000).

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 13**) is **DENIED**.

5 2. Defendant's Motion to Strike Declarations (**Ct. Rec. 68**) is
6 **DENIED**.

7 3. Plaintiff's Motion to Strike Response to Motion(**Ct. Rec. 77**) is
8 **DENIED**.

9 **IT IS SO ORDERED.** The Clerk is hereby directed to file this order
10 and provide copies to counsel.

11 **DATED** this 16th day of May, 2007.

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13 *s/Lonny R. Suko*

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15 LONNY R. SUKO
16 UNITED STATES DISTRICT JUDGE
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